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Malpractice - Vicarious Liability of an Operating Surgeon

Lawrence S. Pope

unequivocal legislative determination of public policy;[32] therefore, any attempt to waive local health or housing code violations should be declared void.

This concept of prohibiting waiver of local housing regulations as applied to rent withholding laws has already been recognized by the California courts.[33] Indeed, Common Pleas Courts in Pennsylvania have extended *Boyd*[34] to nullify clauses in leases which have violated local safety ordinances.[35]

The courts, having already prohibited the waiver of public policy as declared by the legislature in the form of health and safety laws, should have little difficulty in prohibiting the waiver of local health and housing ordinances which are utilized to effect the legislative purpose behind the Rent Withholding Act.

It should be noted that the court, in holding the Act constitutional and interpreting it to the tenant's advantage, has indicated that it recognizes the importance of the rent withholding concept. This legislative and judicial mandate can be frustrated if landlords are permitted to devise leases which will cause tenants to waive the benefits the Rent Withholding Act was designed to afford them.

Mark Louis Glosser

MALPRACTICE—VICARIOUS LIABILITY OF AN OPERATING SURGEON—The Supreme Court of Pennsylvania has held that a trial judge may not direct a jury verdict on the issue of the vicarious liability of an operating surgeon for the negligence of his assistants.

Thomas v. Hutchinson, 442 Pa. 118, 275 A.2d 23 (1971).

Plaintiff underwent surgery for a ruptured disc. After Dr. Hutchinson successfully removed the disc he left the operating room, leaving the closing of the incision to three orthopedic residents. These residents, employees of the hospital, had been selected to assist in this operation by the operating room supervisor, also an employee of the hospital.

32. Bell v. McAnulty, 349 Pa. 384, 386, 37 A.2d 543, 544 (1941).
33. Buchner v. Azuali, 251 Cal. App. Supp. 1013, 59 Cal. Rptr. 806 (1967). *See generally* Annot., 27 A.L.R.3d 920 (1969).
34. 372 Pa. 306, 94 A.2d 44 (1953).
35. Maglin v. Weinberg, 21 D. & C.2d 630 (1959) defective fire escape; Fegley v. Pinsker, 104 P.L.J. 73 (1955) defective furnace; Harris v. Greenberg, 17 D. & C.2d 1966 (1968) defective stairs and poor lighting; *cf.* Bowman v. McGillick, 104 P.L.J. 484 (1956).

In closing the incision, these residents failed to remove a surgical sponge from the wound. This failure was stipulated at trial to be negligent.

The trial court directed the verdict for the plaintiff on the only remaining issue, whether Dr. Hutchinson was vicariously liable for the negligence of these residents. The court acted on the basis of Dr. Hutchinson's pretrial deposition; he having died before the trial began. In this deposition he stated that the residents were his "assistants" and that he was "directing" the operation.

The Pennsylvania Supreme Court reversed, holding that the trial court was not justified in directing the issue of liability for the plaintiff. The court refused to construe the defendant's deposition statements as admissions of agency. In addition, the court decided that binding instructions for the plaintiff were not justified on any theory of vicarious liability.

In *McConnell v. Williams*,[1] the first Pennsylvania case to deal in this area, the court removed a non-suit in favor of a privately hired obstetrician holding that he could be vicariously liable for the negligence of a hospital intern who was assisting him. In that case the court stated:

> [I]n the course of an operation in the operating room of the hospital, and until the surgeon leaves the room at the conclusion of the operation . . . he is in the same complete charge of those who are present and assisting him as is the captain of the ship over all on board.[2]

From this quotation arose the "captain of the ship" doctrine which was to govern the vicarious liability of operating surgeons in the future.

This doctrine was next employed to remove a non-suit in favor of a privately hired surgeon whose nurse negligently burned the patient during the preoperative procedure under the surgeon's supervision.[3]

In these two cases the court applied established principles of the "borrowed servant" concept to the operating room. Under the "borrowed servant" concept the test of whether the borrowing party was liable for the negligence of the "borrowed servant" was whether the borrowed employee was subject to the direction and control of the

1. 361 Pa. 355, 65 A.2d 243 (1949).
2. *Id.* at 362, 65 A.2d at 246.
3. Benedict v. Bondi, 384 Pa. 547, 122 A.2d 209 (1956).

borrowing employer.[4] The "captain of the ship" doctrine was just a recognition of the high degree of control that an operating surgeon must have over the operating room.

In later cases[5] the court broadened this doctrine and deviated significantly from the "borrowed servant" concept as it had evolved with its emphasis on the benefit to the master.[6] In *Rockwell v. Stone*[7] the court held an anesthesiologist vicariously liable for the negligence of his subordinate. The defendant was, at the time, acting as a salaried supervisory employee of the hospital. Although he had control of his alleged servant, he received no personal benefit from this subordinate's performance. In *Rockwell v. Kaplan*,[8] a case arising from the same facts, the court held the operating surgeon vicariously liable although he was not present and although it was not established that he had any authority over the induction of anesthesia. In other words, the operating surgeon had no control over the quality of the anesthesiologist's performance; the surgeon could only order him to either begin administering or stop administering the anesthetic. Thus the "captain of the ship" doctrine was used to extend vicarious liability to cover persons, who in other areas of agency law, were considered independent contractors.[9] In fact the court had so extended the doctrine that vicarious liability could attach even though the alleged servant was not acting for his master's private benefit and even though it was not clear that the alleged master had the right to control the quality of performance.

The court in *Collins v. Hand*[10] began to backstep from this extreme position. In holding that the right to order the beginning and end of performance was insufficient to make one a master it implicitly overruled *Rockwell v. Kaplan*.[11] It noted that such rights did not constitute the right of control in the manner of performance, especially when the actors were more expert in the procedure than the alleged

4. Siidekum v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 414, 45 A.2d 59, 61 (1945). In this case the hospital was the general employer, the obstetrician and the surgeon were borrowing employers, and the intern and the nurse were the borrowed servants.
5. Yerston v. Pennell, 397 Pa. 28, 153 A.2d 255 (1959); Rockwell v. Stone, 404 Pa. 561, 173 A.2d 48 (1961); Rockwell v. Kaplan, 404 Pa. 574, 173 A.2d 54 (1961).
6. Commonwealth to the use of Orris v. Roberts, 392 Pa. 572, 584-85, 141 A.2d 393, 399 (1957).
7. 404 Pa. 561, 173 A.2d 48 (1961).
8. 404 Pa. 575, 173 A.2d 54 (1961).
9. *See* Mature v. Angele, 373 Pa. 593, 600-601, 97 A.2d 59, 62 (1953).
10. 431 Pa. 378, 246 A.2d 398 (1968).
11. 404 Pa. 574, 173 A.2d 54 (1964).

master. Thus the court brought the right of control aspect of the "captain of the ship" doctrine back into line with general agency law.[12]

This doctrine was finally limited to the confines of the "borrowed servant" concept by the noted case. The court itself stated that the "captain of the ship" doctrine was "but the adaptation of the 'borrowed servant' concept in the law of agency to the operating room of a hospital."[13] There was no question the defendant surgeon had the right of control over the resident. Indeed, he admitted he was "directing" the operation and that the residents were his "assistants." The only issue left for the jury on retrial was whether the residents were acting for the defendant's private business benefit. Thus the court brought the tests of a master-servant relationship from general agency law[14] back into the "captain of the ship" doctrine.

In so limiting this doctrine the court was acting to correct an aberration introduced into the law by the tort immunity of public hospitals. In previous cases[15] the court had said or cited with approval that:

> If operating surgeons were not to be held liable for the negligent performances of those who were working under them, the law would in large measure fail to afford a measure of redress for preventable injuries sustained during the course of such operations.[16]

In view of the demise of this immunity[17] the court found this rationale was no longer applicable. It concluded that liability should not be extended to the operating surgeon merely to financially restore the patient.

The court, however, in correcting this aberration in the agency law of medical malpractice, introduced a new aberration. It left to the jury the establishment of a standard against which the vicarious liability of the operating surgeon was to be measured. This was contra to the Pennsylvania law of general agency wherein it was stated that "where the facts are not in dispute and the evidence presents no sufficient grounds for inconsistent inferences therefrom, the question as to who

12. 373 Pa. at 600-601, 97 A.2d at 62.
13. Thomas v. Hutchinson, 442 Pa. 118, 125, 275 A.2d 23, 27 (1971).
14. 392 Pa. at 584-85, 141 A.2d at 399.
15. McConnell v. Williams, 361 Pa. 355, 65 A.2d 243 (1949); Benedict v. Bondi, 384 Pa. 547, 122 A.2d 209 (1956); Yerston v. Pennell, 397 Pa. 28, 153 A.2d 255 (1959); Rockwell v. Stone, 404 Pa. 561, 173 A.2d 48 (1961); Rockwell v. Kaplan, 404 Pa. 574, 173 A.2d 54 (1961).
16. 361 Pa. at 364, 65 A.2d at 247.
17. Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 208 A.2d 193 (1965), overturning the tort immunity of public non-profit hospitals.

is the servant's employer is a matter for the determination of the court."[18] In such cases,[19] the determination of whether there was a master-servant relationship was treated as a matter of law. The function of the jury, in such a situation, was to act merely as a fact finder.

The function of the jury in finding a master-servant relationship must be distinguished from its function in determining primary negligence. In the former situation the jury should measure the facts against the standard given it by the court,[20] whereas in the latter case the jury should formulate its own standard of what a "reasonable man" would have done.[21]

The Pennsylvania Supreme Court failed to make this distinction and therefore erroneously reversed the trial court's determination in the instant case. There were no conflicting facts in this case. It was clearly established at trial by the defendant's own statements that the residents were subject to his control. Since the defendant surgeon was acting to further his private practice there was no question that the negligent residents were furthering his personal business. Yet the court left the determination of the operating surgeon's vicarious liability to the jury on retrial.

It may be that the Supreme Court was using this case as a vehicle to correct the anomaly introduced into the law by the tort immunity of public hospitals. However, it is submitted that it should have done so without leaving the area of medical malpractice outside of general agency law. The court should have given the jury a standard with which to measure the vicarious liability of the defendant surgeon.

A standard suitable for this problem was developed in the New York case of *Santise v. Martins Inc.*[22] In that case the court borrowed

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18. 373 Pa. at 598, 97 A.2d at 60.

19. McGrath v. E.G. Budd Mfg. Co., 348 Pa. 619, 36 A.2d 303 (1944), wherein the court reversed a jury finding of a master-servant relationship declaring that the relationship did not exist as a matter of law, and Campagna v. Ziskind, 287 Pa. 403, 101 A.2d 304 (1926), wherein the court sustained a non-suit based on a trial court's determination that the plaintiff was the defendant's servant and therefore was precluded from suing by the Worker's Compensation Act, PA. STAT. ANN. tit. 77, § 22 (1966).

20. 373 Pa. at 598, 97 A.2d at 60.

21. Kramer v. Standard Steel Car Co., 281 Pa. 348, 351, 126 A. 800, 801 (1924); Blasi v. Bonnert, 186 Pa. Super. 179, 142 A.2d 752 (1958); *see also* 27 P.L.E. *Negligence* § 196 (1960).

22. 258 App. Div. 663, 17 N.Y.S.2d 741 (1940). In this case the plaintiff went into the basement of the defendant's department store and tried on a pair of shoes in the shoe department. One of the shoes had a nail protruding from the inner sole which injured the plaintiff. The shoe department was, in fact, run by an independent contractor who leased space from the defendant's department store. The New York court held that the department store could be vicariously liable for the plaintiff's injury since it was indeed the "ostensible owner" of the shoe department.

the concept of "ostensible owner" from the principal-agent law and applied it to master-servant law. The court held that if one allowed himself to appear to be the master of an alleged servant he would be vicariously liable for that apparent servant's negligence.

If the Pennsylvania Supreme Court had adopted this concept it would have been a significant improvement in the law. It would have allowed the various medical specialists to delimit their respective areas of expertise to the patients and thereby correspondingly limit their legal responsibility.[23] However, if these medical practitioners left the patient in the dark as to the complexity of modern day surgical procedure the patient could look to those he depended on for legal responsibility. For instance, if a patient were made aware that the anesthesiologist had sole control over the administration of anesthesia and that such procedures were outside the expertise of the surgeon, then the surgeon would not be legally responsible for any negligence of the anesthesiologist.

Under such a scheme it is difficult to foresee how the hospital could ever escape liability. If the negligent actor were not an actual servant of the hospital, *e.g.* a resident, he would probably be an apparent servant. For example, any private doctor whom the hospital allowed to operate at their facilities would appear to be their servant. In most cases he would be all but their actual servant. He would be acting for the hospital's business benefit since it would receive fees for the use of the operating room which it could only receive if surgeons operated there. In addition, he would be subject to the hospital's rules regarding procedures, and in most cases he would be obliged to utilize the hospital staff to assist. If special circumstances did arise in which the hospital's right of control were more limited it could reveal this to the patient and escape liability.

Lawrence S. Pope

23. As is pointed out in Mahoney, *Pennsylvania's Captain of the Ship Doctrine: A Mid-Twentieth Century Anachronism*, 71 DICK. L. REV. 432 (1967), one of this state's failings in the law of vicarious liability for medical malpractice has been an inability to recognize the complete and differing expertise of different actors in the operating room of a modern hospital.